89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a failure to observe the "first appearance" requirement of the Bail Reform Act, 18 U.S.C. 3142(f) (Supp. V 1987), requires the release of a person who would otherwise be subject to pretrial detention.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 876 F.2d 826. The district court opinion (App., *infra,* 16a-31a) is reported at 713 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 32a) was entered on May 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3142(f) of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), provides in pertinent part:

(f) *Detention Hearing*. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

* * * * *

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the Government may not exceed three days. * * *

STATEMENT

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides that a person charged with an offense shall be detained prior to trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e) (Supp. V 1987). The Act further provides that the government or the judicial officer may initiate detention proceedings and that a detention hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). In this case, the district court found that no release conditions would assure respondent's appearance at trial or ensure that he would not pose a danger to the community. Nonetheless, the district court and the court of appeals both concluded that respondent was entitled to pretrial release because there had been a failure

to observe the "first appearance" provision of the Bail Reform Act.

1. On Wednesday, February 8, 1989, at approximately 3:30 a.m., United States Customs Service agents stopped respondent at a highway checkpoint north of Orogrande, New Mexico, near the Mexican border. The agents questioned respondent, who was the lone passenger in a pickup truck, concerning his citizenship. Respondent produced papers showing that he was a Mexican citizen legally residing in the United States. The agents then examined respondent's truck. They noted that it had been mounted with an auxiliary gas tank but that the tank was not connected to the engine. Upon further examination, they found that the tank had been fitted with a concealed door. Opening that door, the agents discovered approximately 72 pounds of cocaine, which had a wholesale value of almost $1 million. The agents also found $6,500 in U.S. currency concealed in the passenger section of the truck. App., *infra*, 4a, 17a, 21a, 23a; Feb. 23, 1989, Tr. 73-77.

The agents transported respondent to the Customs Service's local office, where they read respondent his rights and explained them to him. Respondent stated that he had intended to deliver the cocaine to purchasers in Chicago, Illinois, and he agreed to cooperate with the Drug Enforcement Administration (DEA) by making a "controlled delivery" of the cocaine under government surveillance. Later that day, several DEA agents escorted respondent by air carrier to Chicago, while another agent drove respondent's pickup truck to that destination. The agents parked the truck at a location in Chicago designated by respondent, but the anticipated purchasers failed to appear to complete the transaction. Meanwhile, on Friday, February 10, 1989, the government filed a criminal complaint in the United States District Court for the District of New Mexico charging respondent with possession of cocaine with

intent to distribute it, in violation of 21 U.S.C. 841. App., *infra,* 5a, 17a-18a; Feb. 23, 1989, Tr. 81-82.

2. Arrangements were then made to transfer respondent back to New Mexico. A magistrate in the District of New Mexico issued a warrant for respondent's arrest, and respondent was then taken before a magistrate in the Northern District of Illinois for a transfer hearing pursuant to Fed. R. Crim. P. 40. The magistrate in Illinois advised respondent, who was represented by a public defender, that he faced criminal charges in New Mexico. A local Assistant United States Attorney then explained that "the government was going to move for detention." Feb. 10, 1989, Tr. 4. After consulting with respondent's counsel, however, the Assistant United States Attorney said that the parties had agreed that if respondent were returned immediately to New Mexico, "we would not hold the detention hearing here and they would waive their right at this point and, however, not waive any rights to preliminary hearings or detention hearings in that district." *Id.* at 4-5. The magistrate asked whether respondent consented to the agreement, and he replied through an interpreter, "Yes. They want me to, I am with them." *Id.* at 7. The magistrate indicated that he would "enter an order of removal specifically reserving the issues of * * * detention and probable cause for determination by the District Court in New Mexico." *Id.* at 7-8. Respondent was returned to New Mexico that evening, Friday, February 10, and placed in the custody of local officials. App., *infra,* 5a-6a, 18a-19a.

3. On Monday morning, February 13, 1989, the DEA asked the New Mexico magistrate's office to arrange for respondent's detention hearing. The magistrate's office scheduled the hearing for Thursday, February 16. At the February 16th hearing, the magistrate described the charges against respondent, who was represented by re-

tained counsel, and read him his rights. The magistrate then verified that the Pretrial Services Office had not yet prepared a report on respondent. The magistrate stated:

> All right. I think, therefore, in the interest of judgment [*sic,* justice], that I should continue the detention hearing for a maximum of three working days, as the United States wishes to request. The detention and motion for detention will need to be filed. Otherwise, I will review the conditions of release and consider those within three working days.

Feb. 16, 1989, Tr. 5.[1] After observing that Monday, February 20, was a federal holday, the magistrate rescheduled the hearing for Tuesday, February 21. *Id.* at 5-6. The government filed a formal motion for detention on February 17, and the magistrate held the detention hearing, as scheduled, on February 21. At the conclusion of the hearing, the magistrate decided to release respondent upon the posting of a $50,000 bond and compliance with other conditions and restrictions. App., *infra,* 6a-8a, 19a-20a; Feb. 21, 1989, Tr. 1-21.

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[1] Although the magistrate's statement suggests that the United States desired a continuance, the district court concluded that neither the government nor respondent formally moved for a continuance and that they apparently were prepared to proceed with the detention hearing on February 16. See App., *infra,* 19a. Respondent's counsel (who, like the government attorney, had not been present at the Illinois proceeding) did not specifically object to the continuance, but she did contend that the government had failed to move for detention in the proceeding before the Illinois magistrate, stating that "it's my understanding that the government is required to move for detention in Chicago where [the defendant] had his initial appearance. I think that he waived his identity hearing, but I don't believe he waived the detention hearing at that point." Feb. 16, 1989, Tr. 5. The New Mexico magistrate responded that "that's a matter we will have to take up—you can take up with the district judge if you want to." *Ibid.*

4. The government immediately requested that the district court review the magistrate's decision (see 18 U.S.C. 3145(a)(1) (Supp. V 1987)), and the district court held a *de novo* detention hearing on February 23, 1989. The government submitted that respondent posed both a risk of flight and a danger to the community. Feb. 23, 1989, Tr. 28, 121-128. Respondent contested that submission, *id.* at 108-120, 128-130, and also argued that he was entitled to release because the detention hearing had not been held within the time limits set forth in Bail Reform Act. *Id.* at 11-12, 17, 29-31.

On March 1, the district court ruled on the detention motion. The court found that respondent "has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure [his] appearance as required and the safety of the community." App., *infra,* 16a; see *id.* at 21a-24a. The court further concluded, however, that "there has been a failure to comply" with the Bail Reform Act's procedural provisions, "which precludes further detention of the [respondent] and mandates the setting of conditions for his release." *Id.* at 16a-17a. The district court relied on Section 3142(f) of the Bail Reform Act, which states that a detention hearing "shall be held immediately upon a person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" and further provides that "[e]xcept for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the government shall not exceed three days." See App., *infra,* 24a-26a.

The district court concluded that the Illinois magistrate's February 10th removal order and the New Mexico magistrate's February 16th sua sponte continuance, which was granted "in the interest of justice," App., *infra,* 19a, resulted in a violation of Section 3142(f)'s time limits. *Id.*

at 24a-30a. The court stated that a person may waive these time limits, but it concluded that respondent did not "knowingly and voluntarily" waive his right to a prompt hearing in this case. *Id.* at 27a-28a, 30a.

Turning to the issue of the appropriate remedy, the court acknowledged that "Congress did not explicitly state that a failure to comply with § 3142(f) mandates" pretrial release. App., *infra,* 31a. The court nevertheless concluded that "meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions." *Ibid.* The court amended the magistrate's release conditions to require bond in the amount of $8500 and issued an order allowing respondent's release. *Id.* at 16a-17a, 31a.

5. The government appealed and requested a stay of the district court's order. The court of appeals issued a temporary stay but ultimately affirmed the district court's ruling. App., *infra,* 1a-15a. The court of appeals concluded that "although the delay between the [respondent's] appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte,* constituted a material violation of the specific instructions Congress provided in crafting § 3142(f)." App., *infra,* 13a. The court further stated:

> If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consequences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of a *de novo* hearing by the district court did not cure the fact that the New Mexico magistrate was without authority to extend the date of the hearing from

> February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Id. at 14a-15a.

Since his release, respondent has failed to appear, as required, for subsequent court appearances. He is believed to have fled to Mexico.[2]

REASONS FOR GRANTING THE PETITION

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, "represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process." *United States* v. *Salerno*, 481 U.S. 739, 742 (1987). It specifies the standards judicial officers must apply and the procedures they must follow in making pretrial detention and release determinations. See 18 U.S.C. 3142 (Supp. V 1987). Respondent met the standard for pretrial detention because he was found to present both a serious risk of flight and a danger to the community. The court of appeals found, however, that the magistrate made a procedural error in handling the detention issue: he failed to observe the "first appearance" provision of Section 3142(f) by not holding a detention hearing within the prescribed period after respondent's first appearance in court. The question presented by this case is whether that procedural misstep entitles respondent to automatic pretrial release without regard to the risk that he will flee or the danger that he poses to the community. This question, which has produced a conflict among the courts of appeals, has great practical significance. The court of appeals' resolution of the issue is incorrect and warrants this Court's review.

[2] Respondent's apparent flight does not render this case moot. The controversy remains live because its resolution will determine the course of proceedings if and when respondent is rearrested. See *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985) ("Because our reversal of the Court of Appeals' judgment may lead to the reinstatement of respondents' convictions, respondents' fugitive status does not render this case moot."). See also *Florida* v. *Rodriguez*, 469 U.S. 1 (1984). If this Court reverses the court of appeals' holding that the magistrate's supposed failure to comply with the Bail Reform Act's "first appearance" requirement does not entitle respondent to release, then the government could detain respondent immediately upon his rearrest. If, however, the court of appeals' decision is left standing, then the government cannot detain respondent unless it first seeks revocation of the existing release order. See 18 U.S.C. 3148(b) (Supp. V 1987).

1. Section 3142(f) of the Bail Reform Act provides that upon motion of the government (or in certain circumstances, on the judicial officer's own motion) the judicial officer "shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." 18 U.S.C. 3142(f) (Supp. V 1987). Section 3142(f) further states:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

This so-called "first appearance" provision has been a source of persistent controversy. For example, the courts of appeals have disagreed on whether a defendant may waive his right to an immediate detention hearing,[3] what

[3] Compare *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc) ("We now hold that both the time requirements and

constitutes a "first appearance," [4] when a judicial officer may grant a continuance *sua sponte*,[5] and how weekends and holidays should be treated in calculating the time periods for a continuance.[6] These differences have resulted in substantial variation among the circuits in the procedures for making pretrial detention determinations.

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the detention hearing itself provided for in section 3142 are waivable."), and *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985) ("Coonan, however, would have us hold that the statutory right to a detention hearing within, at most, five days of the initial appearance is not waivable. This we decline to do * * *."), with *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985) ("The Bail Reform Act does not permit a waiver of time requirements by the defendant."). See also *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) ("Unless a defendant objects to the proposed hearing date on the stated ground that the assigned date exceeds the three-day maximum, he is deemed to acquiesce in up to a five-day continuance.").

[4] Compare *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc) (footnote omitted) ("A fair reading of the statute is not that a detention hearing must be held "immediately" when a defendant first appears in court, else to be forever barred, but rather that once a motion for pretrial detention is made, a hearing must occur promptly thereafter."), with *United States* v. *Al-Azzawy*, 768 F.2d at 1144 ("The 'first appearance' would appear to mean the post-arrest hearing prescribed in Rule 5, Fed. R. Crim. P."). See also *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986) ("a removal hearing may precede a detention hearing, leaving the latter normally to occur in the district of prosecution after removal").

[5] Compare *United States* v. *Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) ("except in the most compelling situations, the judicial officer should not act *sua sponte* to delay the detention hearing"), with *United States* v. *Hurtado*, 779 F.2d 1467, 1475 (11th Cir. 1985) ("a judicial officer has no authority to act *sua sponte* on questions of temporal continuances").

[6] Compare *United States* v. *Melendez-Carrion*, 790 F.2d at 991 (time computation excludes weekends and holidays), with *United States* v. *Hurtado*, 779 F.2d at 1474 n.8 (time computation includes weekends and holidays).

On a more fundamental issue, the courts of appeals are in disagreement concerning the appropriate remedy for failure to comply with the "first appearance" requirement. The First, Fourth, and Eleventh Circuits have indicated that a violation of the "first appearance" requirement does not prevent the government from seeking pretrial detention at a subsequent detention hearing.[7] The Ninth Circuit, joined by the Tenth Circuit in this case, have held, however, that a failure to observe that provision immunizes the person from subsequent detention.[8]

Although it is by no means clear that the delay in holding the detention hearing in this case violated the "first appearance" requirement, we limit our petition to the question whether the court of appeals chose the appropriate remedy for that arguable lapse. That question, which arises whenever a court finds that there has been a failure to follow the Bail Reform Act's procedural requirements,

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[7] See *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986) ("we see no basis for reversing the district court's detention order based on [the defendant's] arguments concerning the adequacy and timeliness of the detention hearing"); *United States* v. *Clark*, 865 F.2d at 1436 (4th Cir.) ("in cases where the requirements of the Bail Reform Act are not properly met, automatic release is not the appropriate remedy"); *United States* v. *Hurtado*, 779 F.2d at 1481-1482 (even though detention hearing held out of time, court instructs district court to "hold a *de novo* hearing under 18 U.S.C. § 3142 at which the merits of pretrial detention in this case are to be reconsidered").

[8] See *United States* v. *Al-Azzawy*, 768 F.2d at 1145 ("If the time constraints are violated in any material way, the district court should not order unconditional pretrial detention of the person."); App., *infra*, 15a ("Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions."). See also *United States* v. *O'Shaughnessy*, 764 F.2d 1035, 1038-1039 (holding that noncompliance with the first appearance provision precludes detention), appeal dismissed on rehearing as moot, 772 F.2d 112 (5th Cir. 1985).

has continuing and far-reaching importance beyond the magistrate's supposed procedural error in this case. As Congress noted in enacting the Bail Reform Act, the government has encountered serious difficulties in securing the appearance of drug traffickers at trial. See S. Rep. No. 225, 98th Cong., 1st Sess. 20 (1983).[9] Procedural errors in the handling of detention hearings are bound to occur from time to time, particularly since the statute requires that the parties and the court act with great dispatch in the often chaotic period following a defendant's arrest. If a procedural slip—even a minor one such as exceeding by one day the permissible period for holding a detention hearing—requires the automatic release of the defendant, no matter how strong the case for detention, many defendants who are charged with serious crimes can be expected to flee before trial or commit serious crimes while on re-

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[9] The Senate Report explains:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

S. Rep. No. 225, *supra*, at 20 (footnote omitted).

lease. The class of persons as to whom the rule of automatic release will make a difference in their detention status are, after all, the persons who would otherwise be detained pending trial, *i.e.*, those persons for whom conditions of release will not "reasonably assure" their appearance at trial or the safety of the community. 18 U.S.C. 3142(e) (Supp. V 1987).

2. We submit that the court of appeals erred in imposing a remedy so plainly at odds with the objectives of the Bail Reform Act. The text of the statute does not require, or even suggest, that a magistrate's (or the government's) failure to observe the "first appearance" provision requires the release of a person who is otherwise subject to pretrial detention. Nor is there anything in the legislative history of the statute to suggest that Congress contemplated that absolute immunity from detention would follow from any violation of the statutory procedures. See S. Rep. No. 225, *supra*, at 21-22.

The logical remedy for a failure to provide a detention hearing at the defendant's "first appearance" is to provide a detention hearing at the earliest practicable opportunity thereafter. That remedy is responsive to the dual goals of the Bail Reform Act to require prompt resolution of the detention issue but at the same time to ensure that defendants are not released if it is determined that they present a serious risk of flight or danger to others.

The remedy we propose comports not only with the specific objectives of the Bail Reform Act, but also with the principle that the ultimate goal of criminal procedure is a just adjudication. An unnecessarily broad remedy, as much as an inadequately narrow remedy, subverts that goal. See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Thus, this Court has stated that, even in the case of constitutional violations, "remedies should be tailored to the injury suffered * * * and should not unnecessarily in-

fringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The court of appeals' remedy in this case, which apparently has resulted in the predictable flight of a major drug trafficker, is fundamentally incompatible with "society's interest in the administration of criminal justice" (*ibid.*).

The court of appeals' remedy is also excessive when measured against the prejudice that the error caused respondent. The only prejudice respondent suffered was that he was held in custody for a few days longer than he would have been if a detention hearing had been held earlier and the district court had decided that respondent should be released.[10] The lower courts did not find, nor is there any basis for assuming, that the delay in holding the detention hearing prejudiced respondent in his ability to defend against the detention motion or to defend against the underlying allegations in the case.

Respondent's own conduct suggests that the delay was not prejudicial to him. Although he was represented by counsel, respondent did not insist on a prompt detention hearing. He specifically waived his right to an immediate detention hearing before the Illinois magistrate, he did not object to the New Mexico magistrate's decision to continue the hearing for three working days, and he did not move to accelerate the hearing during that period. See pp. 4-5, *supra*. Respondent's failure to insist on a prompt hearing is itself a persuasive indication that he suffered no prejudice, and perhaps even obtained some advantage, from the delay. Cf. *Barker* v. *Wingo*, 407 U.S. 514 (1972). In any

[10] Of course, since the district court determined that, but for the delay in holding the detention hearing, respondent should be detained, it turns out that the delay did not prejudice respondent at all, since the district court presumably would have reached the same conclusion following an earlier detention hearing and would have ordered respondent detained for the entire period before the trial.

event, the blunderbuss remedy of automatic release, regardless of the degree of prejudice and regardless of the risks associated with release, is inconsistent with this Court's concern that judicial remedies be responsive to the competing interests of the individual, the government, and society within the criminal justice system. In short, a rule of automatic release converts the pretrial detention procedures into " 'a game in which a wrong move by the judge means immunity for the prisoner.' " *Jones* v. *Thomas*, No. 88-420 (June 19, 1989), slip op. 10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-2056

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR-89-86)

[Filed May 31, 1989]

Per Curiam.

Before: Moore, Anderson, and Tacha, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This appeal is taken from an order of the United States District Court for the District of New Mexico setting terms and conditions of defendant's release pending trial,

notwithstanding the court's finding that no conditions or combination of conditions would reasonably assure his presence in court or the safety of the community, 18 U.S.C. § 3142(e).[1] The court directed release after determining that release on conditions was the appropriate remedy for violations of the failure to hold a detention

[1] (e) Detention. – If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that –

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

hearing within the time requirements of 18 U.S.C. § 3142(f).[2] We affirm.

[2] (f) Detention hearing. – The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community –

(1) upon motion of the attorney for the Government, in a case that involves –

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves –

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not

We recite the facts from the district court's memorandum opinion and order filed March 1, 1989.

> On February 8, 1989 defendant, a Mexican citizen and legal resident alien of the United States, was arrested by United States Customs agents at a checkpoint in Orogrande, New Mexico in connection with the discovery of a substantial quantity of cocaine in an auxiliary gasoline tank mounted in the rear of defendant's pickup truck. According to the customs agents, defendant advised that his destination was Chicago, Illinois where he intended to make delivery of the cocaine, and at the agents' request defendant agreed to participate in a "controlled delivery" to the anticipated purchasers. The customs agents then met

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exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

> with personnel of the Drug Enforcement Administration who made arrangements for the Chicago venture. Consequently, defendant flew to Chicago, Illinois in the company of a DEA agent and another DEA agent drove defendant's vehicle to Chicago where the controlled delivery was attempted. However, nobody showed up to receive the shipment in Chicago.
>
> On February 10, 1989 a complaint was filed in New Mexico and the United States Magistrate for the District of New Mexico issued a warrant for defendant's arrest; and defendant, who at the time was in Chicago, was taken before a United States Magistrate in Illinois for a hearing in accordance with Rule 40 of the Federal Rules of Criminal Procedure. This was defendant's initial appearance before a judicial officer.
>
> During the February 10 hearing Ms. Garza, the Assistant United States Attorney who was handling the case, advised the Magistrate that the Government "was going to move for detention" but an agreement had been reached with Ms. Green, defendant's court appointed counsel. Ms. Garza represented it had been agreed that defendant would consent to removal of the proceedings to New Mexico, where he was charged, if he would be returned to New Mexico immediately. Ms. Garza stated that they had also agreed that defendant would waive a detention hearing in Illinois, but he would not waive his rights to a preliminary hearing or a detention hearing in New Mexico.
>
> The United States Magistrate in Illinois did not ask defendant any questions to determine his ability to understand his rights and the nature of the proceeding. She asked no questions about his understanding of his rights under 18 U.S.C. § 3142(f). She did not make findings that defendant had knowingly and voluntarily waived his right to an immediate detention hearing or

that defendant had consented to a continuance. The Magistrate advised the defendant, through an interpreter, that before being sent back to New Mexico he had the right to a determination that there was probable cause to believe he committed an offense and that he was the person named in the complaint and further advised him that he was entitled to a hearing on detention or bail. The Magistrate then asked "Is that agreeable to you?" Defendant's counsel responded, obliquely, that "we are not waiving the preliminary hearing." The Magistrate then rephrased the question to defendant by asking "Is that acceptable?" Defendant's response, through the interpreter, was "Yes . . . if they want me to, I'm with them." Next, the Magistrate asked defendant if he had talked to his counsel, Ms. Green, "about it" and defendant's interpreted reply was "Yes, well she is Ms. Green, right?" The Magistrate said "yes" and "alright, then we will enter an order of removal specifically reserving the issues on detention and probable cause for determination by the District Court in New Mexico . . ." Defendant made no statements during the hearing in Illinois other than the two responses, set forth in full above, and a reply of "yes" to a question about whether he understood he was present for a removal hearing. The United States Magistrate in Illinois ordered that the defendant be returned to New Mexico; he was returned late on the evening of Friday, February 10, 1989 and was jailed in Las Cruces, New Mexico.

On the morning of Monday, February 13, 1989, a representative of the Drug Enforcement Administration conferred with the secretary in the office of the United State Magistrate in Las Cruces, New Mexico

about a date and time for a detention hearing and arraignment. The Office of the United States Magistrate for the District of New Mexico scheduled a hearing on Thursday, February 16, 1989. On Wednesday, February 15, 1989 the United States Magistrate appointed counsel to represent the defendant, but retained counsel appeared on defendant's behalf at the hearing the following day, February 16, 1989.

It appears that the Assistant United States Attorney and defendant were prepared to proceed with the detention hearing on February 16, 1989; neither the government nor the defendant moved for a continuance. However, at the beginning of the February 16 hearing the Magistrate stated that "in the interest of justice" the detention hearing should be rescheduled on February 21, 1989, apparently because a Pre-Trial Services Report had not yet been prepared. Again, at the Febuary 16, 1989 hearing, which was defendant's first appearance before a judicial officer in New Mexico, no inquiry was made of defendant's understanding of his right to an immediate detention hearing under 18 U.S.C. § 3142(f) and there was no finding that defendant had knowingly and voluntarily waived his right to an immediate hearing. In fact, the Magistrate did not advise defendant of any rights and asked him no questions. Moreover, the United States Magistrate made no finding, as required by 18 U.S.C. § 3142(f), that there was "good cause" to continue the hearing to February 21, 1989.

In regard to postponing the hearing to February 21, 1989, the Magistrate stated that the hearing would be held that date if the Government moved to detain the defendant and indicated that if it did not, on

February 21, 1989 the Magistrate would set conditions of release. The Government filed a Motion for Detention on February 17, 1989. This was the first detention motion that was actually made; the Government had intended to move for detention on February 10, 1989 before the Magistrate in Illinois, but had not done so by reason of the agreement reached with defendant's court appointed counsel in Illinois. Since the Government filed a written motion for detention on February 17, 1989, the United States Magistrate in Las Cruces, New Mexico proceeded with a detention hearing on February 21, 1989 at the conclusion of which the Magistrate said he would set conditions of release but would allow the Government an opportunity to appeal to United States District Court before entry of the order setting conditions of release. The United States Attorney therefore requested an immediate hearing before the District Court and that hearing was held on February 23, 1989.

The district court temporarily stayed its release order to enable the United States to file a notice of appeal; thereafter, we stayed defendant's release pending further order of the court.

The government argues that the February 21 hearing on the detention motion was timely, that defendant's waiver of an immediate detention hearing (in Illinois) was a request for an indefinite continuance of the hearing for good cause, and that even if a violation of § 3142(f) occurred, the remedy is a prompt detention hearing, not release. Defendant contends that the time constraints of § 3142(f) were violated and that the remedy chosen by the district court was correct.

First, we must determine the appropriate standard by which to review the district court's factual findings and

legal conclusions. Next we must consider whether the time requirements of § 3142(f) were violated under the facts of this case. Finally, if violations of § 3142(f) occurred, we must review the correctness of the district court's choice of remedy.

Under the Bail Reform Act of 1984, 18 U.S.C. § 3141, *et seq.*, pretrial detention is presumptively appropriate for certain offenders upon a finding that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(e). Further, certain offenses carry a presumption that no such conditions or combination thereof will assure appearance and safety, including violations of the Controlled Substance Act, 21 U.S.C. § 801, *et seq.*, where there is probable cause to believe that the person committed an offense for which the maximum term of imprisonment is more than ten years. *Id.*

Under § 3142(a), upon the charged person's appearance before a judicial officer, the officer shall issue an order releasing the person on recognizance or on conditions, temporarily detaining the person under § 3142(d), or detaining the person under § 3142(e). This case involves only § 3142(e).

Detention under § 3142(e) requires a hearing under § 3142(f) on motion of the government (f)(1), or on motion of either the government or the judicial officer (f)(2), depending on certain factors, the hearing is to be held "immediately upon the person's first appearance before the judicial officer," unless a continuance is sought. Except for good cause, the government may have three days and the accused five. An accused may be detained pending completion of the hearing, at which time the person is afforded counsel and may testify by himself or by witnesses.

The ultimate finding for purposes of § 3142(e) "shall be supported by clear and convincing evidence." A detention order issued pursuant to (e) is required to include "written findings of fact and a written statement of the reasons for the detention." § 3142(i). In upholding the constitutionality of the Act, the Supreme Court noted that under § 3142(f), the arrestee is entitled to a prompt hearing. *United States v. Salerno*, 481 U.S. 739, 747 (1987).

Nothing in § 3142(e) provides for a "waiver" of the time requirements for the hearing, *United States v. Hurtado*, 779 F.2d 1467, 1474 n.7 (11th Cir. 1985); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), although a short postponement from the initial appearance in the arresting district (here Illinois) to the first appearance in the charging district (here New Mexico) has been upheld. *See United States v. Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986) (removal hearing may precede detention hearing, leaving latter to occur in prosecuting district after removal). *See also United States v. Dominguez*, 783 F.2d 702, 704-705 (7th Cir. 1986).

Among the issues necessary to resolving the question of whether the detention hearing was timely are (1) when, under these facts, defendant had his first appearance, (2) whether an immediate detention hearing is waivable (and, if so, for how long), and (3) whether defendant in fact waived his right to an immediate hearing. We are confronted by the same difficulties as the district court because the facts are far from crystal clear.

At the outset, we join those circuits which have held that appellate review of detention or release orders is plenary, at least as to mixed questions of law and fact, and independent, with due deference accorded to the trial court's purely factual findings. *See United States v. Hurtado*, 779 F.2d at 1471-72, collecting and analyzing cases from the

First, Third, Sixth, Eighth, and Ninth Circuits: *United States v. Bayko*, 774 F.2d 516, 519-20 (1st Cir. 1985); *United States v. Delker*, 757 F.2d 1390, 1399-1400 (3d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 36-37 (6th Cir. 1985); *United States v. Maull*, 773 F.2d 1479, 1487 (8th Cir. 1985); *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). *See also United States v. Portes*, 786 F.2d 758, 762 (7th Cir. 1985) (joining majority of circuits adopting independent review standard).

At the hearing before the magistrate in Illinois, the government did not specifically move for pretrial detention because counsel for both sides and the defendant had agreed that the preliminary and detention hearings should take place in New Mexico. The government's intention to move for pretrial detention, however, is clear enough, and defendant was thus provided with ample notice of the government's proposed course of action. Additionally, § 3142(f)(1) does not expressly require the government to make a written motion for pretrial detention. *United States v. Volksen*, 766 F.2d 190, 192 (5th Cir. 1985). On this record, we believe the government adequately moved for pretrial detention at the Illinois hearing.

However, by the time of the first hearing before the magistrate in New Mexico on February 16, six days had elapsed since defendant's arrival there. The government had not yet filed a formal motion for pretrial detention, nor had a motion for continuance been sought. Even if we assume that on February 10 defendant could be deemed to have waived his right to an immediate detention hearing (a question we need not answer), and even if we construe counsel's agreement to postpone the detention hearing as an implicit request for a continuance under § 3142(f)(2), the permissible time period had expired by February 16. *See, e.g., United States v. Malekzadeh*, 789 F.2d 850, 851

(11th Cir. 1986) (defendant can implicitly agree to continuance of detention hearing); *United States v. Valenzuela-Verdigo*, 815 F.2d 1011, 1015-16 (5th Cir. 1987) (inferring from record that five-day continuance from initial appearance to hearing was "in substance" requested by defendant).

Most troubling, however, is the magistrate's decision, *sua sponte*, to further continue the matter to February 21. The statute does not authorize a continuance by the judicial officer. *See United States v. Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) (judicial officer should not *sua sponte* delay detention hearing except in most compelling situations); *United States v. Hurtado*, 779 F.2d at 1475 (judicial officer lacks authority to *sua sponte* extend time for hearing).

The magistrate couched his continuance of the hearing in the following language:

> All right. I think, therefore, in the interest of judgment (sic), that I should continue the detention hearing for a maximum of three working days, *as the United States wishes to request*. (Emphasis added.)

Vol. II, p. 5.

However, neither the government nor the defendant requested a continuance. Further, it is fair to conclude from reading the transcript of the February 16 hearing that the magistrate did not intend to conduct the detention hearing until the pretrial services report had been prepared. (Vol. II, pp. 5-6.) There is no indication why this report was not prepared between February 13 when the magistrate's office was first contacted regarding defendant and February 16 when the initial hearing was held in the charging district. There was no finding of good cause for the continuance under § 3142(f), nor would the lack of a pretrial services report, without more, necessarily constitute good cause.

We conclude, then, as did the district court, that although the delay between the defendant's appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte*, constituted a material violation of the specific instructions Congress provided in crafting § 3142(f).

What Congress did not provide, however, is the remedy. Consequently, circuit courts are divided in their conclusions as to what the remedy should be (which again is compounded by the variety of factual situations in which the question arises). *Compare United States v. Al-Azzawy*, 768 F.2d at 1145 (if time constraints violated in material way, district court should not order unconstitutional pretrial detention); *United States v. Payden*, 759 F.2d 202, 205 (2d Cir. 1985) (remedy for failure to provide hearing at first appearance was reconsideration under prior bail law); *United States v. O'Shaughnessy*, 764 F.2d 1035, 1038-39 (5th Cir. 1985) (noncompliance with first appearance requirement for hearing precludes detention) appeal dismissed on rehearing as moot 772 F.2d 112 (5th Cir. 1985); *with United States v. Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc) (automatic release not appropriate remedy where requirements of Bail Reform Act not properly met); *United States v. Coonan*, 826 F.2d 1180, 1185 (2d Cir. 1987) (where defendant otherwise incarcerated and defense counsel's position is that immediate hearing is unnecessary, government is not precluded from seeking detention even if hearing is more than five statutory days after initial appearance); *United States v. King*, 818 F.2d 112, 114-115 (1st Cir. 1987) (where defendant already serving state sentence, detention hearing not required until release from state custody im-

minent); *United States v. Vargas*, 804 F.2d 157, 162 (1st Cir. 1986) (assuming detention hearing inadequate and untimely, subsequent *de novo* hearing by district court cured defect); *United States v. Hurtado*, 779 F.2d at 1481-82 (where hearing untimely and inadequate, detention order would be reversed and matter remanded for *de novo* hearing at which merits of pretrial detention to be reconsidered). *See also United States v. Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) (where defendant fails to object to hearing date, he can be deemed to acquiesce in up to five-day continuance); *United States v. Holloway*, 781 F.2d 124, 128-29 (8th Cir. 1986) (where government's request for detention made at second appearance before same judicial officer, district court's original order setting bond would be reinstated); *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985) (no error in magistrate's scheduling of hearing five days after initial appearance where defendant needed to obtain counsel, no objection to continuance raised, and continuance not suggested by government).

Whether we construe defendant's February 10 agreement to move the hearing to New Mexico as a request for a five-day continuance or a waiver of the right to an immediate hearing, the second continuance, from February 16 to February 21, cannot be justified. Nor do we agree with the premise that the waiver of an immediate hearing "can be viewed as a request for an indefinite continuance for good cause." *United States v. Clark*, 865 F.2d at 1437.

If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consquences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of a *de novo* hearing by the district court did not cure the fact that the

New Mexico magistrate was without authority to extend the date of the hearing from February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Accordingly, the memorandum opinion and order filed March 1, 1989, is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Cr. No. 89-86 JC

UNITED STATES OF AMERICA, PLAINTIFF

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT

[Filed Mar. 1, 1989]

MEMORANDUM OPINION AND ORDER

On February 21, 1989, following a detention hearing held under 18 U.S.C. § 3142(f), the United States Magistrate for the District of New Mexico prepared, but did not enter, an order setting conditions of release of the defendant. Plaintiff took an immediate appeal to the District Court for a *de novo* hearing pursuant to 18 U.S.C. § 3142 which was held on February 23, 1989. Based on the evidence presented during the *de novo* hearing, I find that there is probable cause to believe that the defendant committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act and that the defendant has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure defendant's appearance as required and the safety of the community. However, I also determined that there has been a failure to comply with 18 U.S.C. § 3142(f)

which precludes further detention of the defendant and mandates the setting of conditions for his release. In addition, I find that the Order Setting Conditions of Release prepared by the United States Magistrate on February 21, 1989 is appropriate with one exception, and that it should be entered as the order of this court after amending paragraph 7(j) to require a bond in the amount of $88,500.00, secured by the execution and delivery of mortgages or other legal instruments covering the unencumbered assets of defendant and his wife, before defendant is released.[1]

Background. On February 8, 1989 defendant, a Mexican citizen and legal resident alien of the United States, was arrested by United States Customs agents at a checkpoint in Orogrande, New Mexico in connection with the discovery of a substantial quantity of cocaine in an auxiliary gasoline tank mounted in the rear of defendant's pickup truck. According to the customs agents, defendant advised that his destination was Chicago, Illinois where he intended to make delivery of the cocaine, and at the agents' request defendant agreed to participate in a "controlled delivery" to the anticipated purchasers. The customs agents then met with personnel of the Drug Enforcement Administration who made arrangements for the Chicago venture. Consequently, defendant flew to Chicago, Illinois in the company of a DEA agent and another DEA agent drove defendant's vehicle to Chicago where the controlled delivery was attempted. However, nobody showed up to receive the shipment in Chicago.

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[1] Defendant advised Pre-Trial Services that his unencumbered assets included the residence which he valued at $85,000.00 and two vehicles which he valued at $8,500.00. One of the two vehicles was defendant's 1985 Ford pickup, valued at $5,000.00, which the DEA now possesses.

On February 10, 1989 a complaint was filed in New Mexico and the United States Magistrate for the District of New Mexico issued a warrant for defendant's arrest; and defendant, who at the time was in Chicago, was taken before a United States Magistrate in Illinois for a hearing in accordance with Rule 40 of the Federal Rules of Criminal Procedure. This was defendant's initial appearance before a judicial officer.

During the February 10 hearing Ms. Garza, the Assistant United States Attorney who was handling the case, advised the Magistrate that the Government "was going to move for detention" but an agreement had been reached with Ms. Green, defendant's court appointed counsel. Ms. Garza represented it had been agreed that defendant would consent to removal of the proceedings to New Mexico, where he was charged, if he would be returned to New Mexico immediately. Ms. Garza stated that they had also agreed that defendant would waive a detention hearing in Illinois, but he would not waive his rights to a preliminary hearing or a detention hearing in New Mexico.

The United States Magistrate in Illinois did not ask defendant any questions to determine his ability to understand his rights and the nature of the proceeding. She asked no questions about his understanding of his rights under 18 U.S.C. § 3142(f). She did not make findings that defendant had knowingly and voluntarily waived his right to an immediate detention hearing or that defendant had consented to a continuance. The Magistrate advised the defendant, through an interpreter, that before being sent back to New Mexico he had the right to a determination that there was probable cause to believe he committed an offense and that he was the person named in the complaint and further advised him that he was entitled to a hearing on detention or bail. The Magistrate then asked "Is that agreeable to you?" Defendant's counsel responded, obliquely, that "we are not

waiving the preliminary hearing." The Magistrate then rephrased the question to defendant by asking "Is that acceptable?" Defendant's response, through the interpreter, was "Yes . . . if they want me to, I'm with them." Next, the Magistrate asked defendant if he had talked to his counsel, Ms. Green, "about it" and defendant's interpreted reply was "Yes, well she is Ms. Green, right?" The Magistrate said "yes" and "alright, then we will enter an order of removal specifically reserving the issue on detention and probable cause for determination by the District Court in New Mexico . . ." Defendant made no statements during the hearing in Illinois other than the two responses, set forth in full above, and a reply of "yes" to a question about whether he understood he was present for a removal hearing. The United States Magistrate in Illinois ordered that the defendant be returned to New Mexico; he was returned late on the evening of Friday, February 10, 1989 and was jailed in Las Cruces, New Mexico.

On the morning of Monday, February 13, 1989, a representative of the Drug Enforcement Administration conferred with the secretary in the office of the United States Magistrate in Las Cruces, New Mexico about a date and time for a detention hearing and arraignment. The Office of the United States Magistrate for the District of New Mexico scheduled a hearing on Thursday, February 16, 1989. On Wednesday, February 15, 1989 the United States Magistrate appointed counsel to represent the defendant, but retained counsel appeared on defendant's behalf at the hearing the following day, February 16, 1989.

It appears that the Assistant United States Attorney and defendant were prepared to proceed with the detention hearing on February 16, 1989; neither the government nor the defendant moved for a continuance. However, at the beginning of the February 16 hearing the Magistrate stated that "in the interest of justice" the detention hearing

should be rescheduled on February 21, 1989, apparently because a Pre-Trial Services Report had not yet been prepared. Again, at the February 16, 1989 hearing, which was defendant's first appearance before a judicial officer in New Mexico, no inquiry was made of defendant's understanding of his right to an immediate detention hearing under 18 U.S.C. § 3142(f) and there was no finding that defendant had knowingly and voluntarily waived his right to an immediate hearing. In fact, the Magistrate did not advise defendant of any rights and asked him no questions. Moreover, the United States Magistrate made no finding, as required by 18 U.S.C. § 3142(f), that there was "good cause" to continue the hearing to February 21, 1989.

In regard to postponing the hearing to February 21, 1989, the Magistrate stated that the hearing would be held that date if the Government moved to detain the defendant and indicated that if it did not, on February 21, 1989 the Magistrate would set conditions of release. The Government filed a Motion for Detention on February 17, 1989. This was the first detention motion that was actually made; the Government had intended to move for detention on February 10, 1989 before the Magistrate in Illinois, but had not done so by reason of the agreement reached with defendant's court appointed counsel in Illinois. Since the Government filed a written motion for detention on February 17, 1989, the United States Magistrate in Las Cruces, New Mexico proceeded with a detention hearing on February 21, 1989 at the conclusion of which the Magistrate said he would set conditions of release but would allow the Government an opportunity to appeal to United States District Court before entry of the order setting conditions of release. The United States Attorney therefore requested an immediate hearing before the District Court and that hearing was held on February 23, 1989.

Flight Risk and Community Danger. U.S. Customs agents inspected the defendant's 1985 Ford pickup, in which defendant was the only occupant, at approximately 3:30 A.M., February 8, 1989 at a checkpoint near Orogrande, New Mexico and discovered 72 pounds of cocaine, with an estimated street value of almost one million dollars, in an auxiliary fuel tank having no fuel line connections. On February 17, 1989 a Grand Jury indicted defendant for possessing with intent to distribute more than 5 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(B)(1)(a), the penalty for which would be a term of imprisonment of not less than 10 years and could be life imprisonment. The indictment was enough to support a finding of probable cause giving rise to the rebuttable statutory presumption under 18 U.S.C. § 3142(e).

In an effort to rebut the statutory presumption raised by 18 U.S.C. § 3142(e), defendant produced evidence which showed that he resided and worked in Chicago, Illinois as a legal resident alien from approximately 1979 to mid-1986 and that in 1980 he married Elisa Madrigal Salgado with whom he had three children, all of whom are United States citizens by reason of their birth in the United States. W-2 forms submitted by defendant reflect that he earned wages from employment in Chicago totalling $22,342.34 in 1985 and $14,086.77 in 1986. Defendant also submitted documents in Spanish which indicate that in August, 1986 he purchased a residence in Ciudad Juarez, Mexico for $40,000.00 which he sold in May, 1988 for $57,000.00 and that he sold a business in Cuidad Juarez, Mexico in May, 1987 for $27,800.00; however, these documents do not state that the transactions were for cash. In addition, defendant provided documents which show that on June 8, 1988 he and his wife purchased a residence in El Paso, Texas in the name of his wife, Elisa Madrigal Salgado, at

which gas and electric utilities were registered in the name of the defendant. Defendant and his wife purchased the El Paso residence for approximately $85,000.00 *cash*.

Counsel for the defendant represented that defendant and his family had resided at the residence in El Paso, Texas for five months prior to defendant's arrest in February 1989. From approximately mid-1986 until the fall of 1988, defendant and his family resided in Ciudad Juarez, Mexico, which has a common border on the Rio Grande, with El Paso, Texas. While residing in Ciudad Juarez, defendant operated retail stores. The evidence regarding defendant's activities from which he has earned a livelihood during the last five months while he has been residing in El Paso, Texas is rather vague. During a proffer made by defendant's counsel, there was mention of trading livestock. It is clear, however, that defendant's last employment, documented by W-2 forms or other tax information, was during 1986 in Chicago with American Electric Cordsets. Defendant furnished no documentation of earnings from the retail establishments he claims to have operated in Ciudad Juarez or from employment or business enterprises during the last five months while residing in El Paso, Texas.

Although he lived and worked in Chicago for approximately seven years, defendant returned with his family to Mexico, the country of his citizenship, where he lived for approximately two years before purchasing a home in El Paso, Texas where he and his family have resided for only the last five months. Defendant has strong ties to Mexico where he was born, lived most of his life, and recently operated business enterprises. Defendant is 31 years of age. He has been an adult ten years. If convicted of the crime charged, he likely will be imprisoned for at least the next ten years of his life, years during which his children will be growing up. The temptation to move back across

the Rio Grande will be great. These factors suggest that defendant is a flight risk and that there are no conditions or combinations of conditions which would reasonably assure his appearance in court as required.

In regard to the matter of defendant being a danger to the community, his counsel argued that defendant was merely a "mule" on the lowest rung of the drug trafficking ladder and that the quantity of cocaine found in his possession, although substantial, should not alone support a finding that he is a danger to the community, especially since there is no direct evidence that defendant transported contraband on occasions other than the time he was caught. I believe, however, that there is significant additional evidence from which it could reasonably be inferred that defendant has been much more deeply involved in drug trafficking than a low paid courier intercepted on his first mission. When stopped by U.S. Customs, defendant was the sole occupant of his pickup truck, which he owned, and which had a customized auxiliary fuel tank designed to transport contraband. Moreover, defendant and his wife had purchased a new home in El Paso, Texas in June 1988 for approximately $85,000.00 in cash and subsequently paid for utilities although defendant failed to prove any substantial means of support after selling his retail businesses in Ciudad Juarez. Although there was mention of cattle trading, defendant produced no evidence indicating that this activity generated any profit. Defendant had $6,500.00 in cash in his possession in addition to the approximately one million dollars worth of cocaine when he was intercepted on February 8, 1989. In the absence of credible evidence of other recent sources of income, the more reasonable inference to be drawn is that defendant had access to substantial sums of cash and possessed a very valuable load of cocaine because he had been engaging in drug trafficking, an enterprise with which

he has had more experience than a "mule" on a first time venture. Consequently, I also find that there is no condition or combination of conditions which would reasonably assure the safety of the community if the defendant were to be released.

Non-compliance with 18 U.S.C. § 3142(f). The Tenth Circuit has not directly addressed the requirements of 18 U.S.C. § 3142(f).[2] Other circuits that have considered § 3142(f) have unanimously taken the view that § 3142(f) should be read strictly. *E.g., United States v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc); *United States v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *United States v. O'Shaughnessy*, 764 F.2d 1035 (5th Cir.) (per curiam), *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985) (per curiam); *United States v. Payden*, 759 F.2d 202 (2d Cir. 1985). The history of the Bail Reform Act of 1984 makes evident the reasons for strict construction of the statute. The Bail Reform Act of 1984 substantially revised the Bail Reform Act of 1966 so that in addition to detaining an individual who is a flight risk, the court may now detain a defendant prior to trial if no conditions of release can assure the safety of specific individuals or the community.

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[2] Although the Tenth Circuit has not interpreted the requirements of § 3142, the court has indicated its intention to construe strictly the requirements of § 3142(f). In *United States v. Rivera*, 837 F.2d 906, 925 (10th Cir. 1988), the government moved for detention and the defendant requested a continuance in order to prepare. The court granted a five-day continuance subject to defendant's right to request a shorter time. For reasons not set forth in the opinion, a detention hearing was never held. Defendant argued that all charges should be dropped because the failure to conduct a hearing was tantamount to denial of bail without a hearing, in violation of the Eighth Amendment. The court held that failure to conduct a detention hearing "demanded by the statute [was] inexcusable," but was not sufficient reason to dismiss all charges. *Id.*

Sensitive to pretrial deprivation of liberty, yet concerned about crimes committed by defendants on pretrial release, Congress "carefully drafted" pretrial detention procedural requirements in order "to provide adequate procedural safeguards." S.Rep. No. 225, 98th Cong. 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3191. *See also, United States v. Salerno*, 481 U.S. 739 (1987) (Bail Reform Act's extensive procedural requirements safeguard against constitutional violations). Congress believed that these procedural mechanisms rendered pretrial detention constitutional, and on this basis, courts have construed strictly the time limitations of § 3412(f). *See, e.g., United States v. Hurtado*, 779 F.2d 1467, 1474-75 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc).

Section 3142(f) authorizes a judicial officer to hold a detention hearing:

> (1) upon motion of the attorney for the Government . . . immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

There are two interpretations of the language of § 3142(f). Some courts intepret the time limitations of the statute to mean that the government under no circumstances may obtain a continuance in excess of three days. Under this analysis, a continuance of up to three days may be granted the government; however, any continuance in excess of three days must occur at the request of the defendant, and good cause must exist in order to continue a detention hearing beyond the five days permitted the defendant by

statute. *See United States v. Melendez-Carrion*, 790 F.2d 984, 992 (2d Cir. 1986). Other courts have ruled that upon a showing of good cause, either party may exceed the time limitations set forth in the statute; the government may obtain a continuance in excess of three days, and the defendant may obtain a continuance of more than five days. *United States v. Hurtado*, 779 F.2d 1467, 1474 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc); *United States v. Al-Azzawy*, 768 F.2d 1141, 1144 (9th Cir. 1985). However, under either interpretation of § 3142(f), in the absence of a finding of good cause, the period of a continuance sought by the government and of one sought by the defendant is limited to three and five days, respectively, in light of the fact that the defendant remains detained.

Several courts addressing the issue have found that a defendant can waive the time requirements of § 3142(f). In *United States v. Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987), the court held that where defense counsel stated that "bail was not an issue" since the defendant was being held without bond in state custody on unrelated charges, the defendant implicitly waived his right to a detention hearing within five days. In *United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100), the court held that the defendants, with assistance of counsel, had explicitly, knowingly and voluntarily waived their rights to a timely hearing because of their desire to remain in protective custody. The Magistrate in that case had determined by direct questioning of the defendants about their rights that they understood the proceedings and the waiver of their rights. *Accord, United States v. King*, 818 F.2d 112, 115, n.3 (1st Cir. 1987). Other courts have stated that a defendant may not waive the time limits of § 3142. *United States v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986)

(en banc); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985).

After review of authorities, I am persuaded that the time limits imposed by § 3142 are waivable but such waiver must be knowing and voluntary. *See, United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100); *United States v. King*, 818 F.2d 112, 115 n.3 (1st Cir. 1987) (defendant should state whether or not he or she objects to a postponement). Cf. *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to counsel must be "made with eyes open"); *Brady v. United States*, 397 U.S. 742, 748 (1970) (waiver of right to trial must be made with "sufficient awareness of the relevant circumstances and likely consequences"). The statute was intended to safeguard constitutional rights and timeliness of the detention determination was made a critical component of the procedural safeguards that Congress and the Supreme Court considered essential. Since waiver of a timely hearing can effectively constitute a waiver of the Eighth Amendment right not to be deprived of liberty prior to conviction without a proper finding of flight risk and community danger, any such waiver must be knowing and voluntary.

In this case, however, the defendant did not knowingly and voluntarily waive his right to a detention hearing or waive his rights to the time limits contained in the statute. At the Illinois hearing the defendant merely waived his right to the location of the detention hearing, i.e., to have it conducted in Illinois. Indeed, there was absolutely no discussion of the time limitations of § 3142 during the proceeding before the United States Magistrate in Illinois. As indicated above, the defendant made only three responses to questions during the Illinois hearing, none of which can be understood to constitute a knowing waiver of his right to a timely detention hearing. In addition, his court-

appointed counsel made no statements that indicate the defendant's awareness and waiver of his rights. The Illinois Magistrate seemed to be seduced by the notion that promptly returning defendant to New Mexico without first ascertaining whether he could and did understand his rights would resolve any problem. If the Magistrate had asked questions to determine whether defendant was capable of understanding his rights and the proceeding, had advised the defendant of his rights regarding the deadlines for holding a detention hearing and had inquired whether the defendant knowingly and voluntarily waived the deadlines, the problem that has arisen in this case could have been avoided.

Courts have also recognized that by implication a defendant can be deemed to have requested a continuance to a date within the five-day limit of § 3142 applicable to defendants. In *United States v. Malekzadeh,* 789 F.2d 850 (11th Cir. 1986), the court held the defendant implicitly requested a continuance for four days when the government requested a three-day continuance and neither the defendant or his retained counsel voiced any objection to holding the hearing on the fourth day in order to avoid a Sunday hearing.[3] Even if it can be implied that at the February 10, 1989 hearing in Illinois the defendant moved for a continuance in this case, the maximum time permitted without a finding of good cause would be five days. Assuming, without deciding, that the time computation should exclude weekend days and holidays,[4] the detention hearing

[3] The Eleventh Circuit includes weekend days for purposes of computing the time deadlines under § 3142. See discussion, *infra* note 4.

[4] The circuits are split on whether weekend days and holidays should be counted for purposes of computing the time requirements of § 3142(f). *United States v. Hurtado,* 779 F.2d 1467, 1474 n.8 (11th Cir. 1985) (includes weekend days and holidays for purposes of time computation); *United States v. Melendez-Carrion,* 790 F.2d 984, 991 (2d Cir. 1986) (time computation should exclude weekends and holidays). In view of the fact that the time requirements would not be met in this case even if weekends and holidays were omitted from the time computation, I need not decide this issue.

should have been held not later than February 16, 1989. No detention hearing was held on that date even though it appears that the parties were prepared to go forward with the hearing on February 16, 1989.

Courts have held that a judicial officer lacks authority under § 3142(f) to continue the detention hearing on his or her own motion, *United States v. Al-Azzawy,* 768 F.2d 1141, 1144 (9th Cir. 1985), or to make a *sua sponte* finding of good cause to extend the time for the hearing beyond the time requested in a motion for continuance. *United States v. Hurtado,* 779 F.2d 1467, 1475-76 (11th Cir. 1985), *reh'g denied,* 788 F.2d 1570 (1986) (en banc). On February 16, 1989, the United States Magistrate in New Mexico, without making a finding of good cause and without a request by either party for a continuance, rescheduled the detention hearing for February 21, 1989, "in the interests of justice." The Magistrate's desire to review a Pre-trial Services report prior to holding the detention hearing did not provide authority for the rescheduling absent a finding of good cause and a request for continuance.[5]

[5] At the hearing on February 16, 1989, the Magistrate indicated that he would hold the detention hearing on February 21, 1989 if counsel for the government moved for detention. Although I am not deciding here whether the government's mere announced intention to have moved for detention during the Illinois hearing on February 10, 1989 complied with the requirement that the government make a motion immediately upon the person's first appearance, there may have been a failure to comply with § 3142(f) since a Motion for Detention was not actually filed until February 17, 1989.

Congress cautiously placed limitations on a defendant's right to bail when it enacted the Bail Reform Act of 1984. The statute must be read strictly to comply with Congress' intent and the mandates of the Constitution. I find, therefore, that the defendant did not knowingly and voluntarily waive his right to a timely detention hearing, and the detention hearing on February 21, 1989 was held in violation of the time limits imposed under § 3142(f) of the Bail Reform Act of 1984.

Remedy. Having found that the requirements of § 3142 were not met, I must decide the appropriate remedy. In *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), the Ninth Circuit held that if time constraints of the Bail Reform Act were violated, the district court should not order unconditional pretrial detention of the person. *See also, id.* at 1146, 1148 (Farris, J., concurring, stating district court remains free to impose appropriate conditions of release under § 3142(f)). *Accord, United States v. O'Shaughnessy*, 764 F.2d 1035, 1038 (per curiam), *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985) (per curiam). However, in *United States v. Hurtado*, 779 F.2d 1467, 1482 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc), after careful analysis of the strict limitations imposed by § 3142, the court remanded the case for a *de novo* hearing on the issue of the defendant's detention. *Hurtado* thus left open the possibility that a defendant could be detained prior to trial even where there was a failure to comply with the statutory requirements. In *United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100), the Fourth Circuit, citing the *Hurtado* decision, ruled that even where the requirements of § 3142 are not properly met, automatic release of the defendant is not the appropriate remedy. In *Clark*, however, the failure to comply with the statutory requirements was due to the defendants' ex-

pressed desire to be detained for reasons of personal safety. Therefore, *Clark* is clearly distinguishable from this case.

In view of Congress' strongly expressed concern that strict procedural safeguards be implemented to avoid constitutional problems, I believe that pretrial detention is not permissible in a case with a factual situation like that presented here. In 18 U.S.C. § 3142(f) Congress clearly and precisely established very limited time deadlines and a sole means of extending them through a judicial finding of good cause. Nothing in the language of § 3142(f) suggests or implies that Congress intended that these carefully crafted protections could be given up by a defendant without a knowing, voluntary waiver. Athough Congress did not explicitly state that a failure to comply with § 3142(f) mandates release on conditions in cases where there is no valid waiver, that, I think, is the import of the § 3142(f) terminology selected by Congress. In a case like this, meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions. I will, therefore, order release pending trial under conditions as set forth in the Magistrate's proposed order, as amended.

IT IS ORDERED that plaintiff's appeal from the Magistrate's oral ruling that he would enter an order setting condition of release is denied; and

IT IS FURTHER ORDERED that the Magistrate's proposed conditions of release, as amended in accordance with this Memorandum Opinion and Order, will be set forth in a separate order setting conditions of release, which will be entered by this court.

/s/ JAMES A. PARKER
James A. Parker
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 89-2056

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT-APPELLEE

[Entered May 31, 1989]

JUDGMENT

Before: Moore, Anderson, and Tacha, Circuit Judges.

This cause came on to be heard on appeal from the United States District Court for the District of New Mexico and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

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